U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID DIAZ and DEPARTMENT OF JUSTICE,
FEDERAL CORRECTIONAL INSTITUTION, La Tuna, TX

Docket No. 98-381; Submitted on the Record;
Issued August 23, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Board has carefully reviewed the record evidence and finds that the Office acted within its discretion in declining to reopen appellant's claim for merit review.

The only decision the Board may review on appeal is the October 24, 1997 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on November 5, 1997.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[4] The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

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[1] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

[4] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[5] *Leon D. Faidley, Jr., supra* note 3 at 111.

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[6] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[7] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[8]

Clear evidence of error is intended to represent a difficult standard.[9] The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[10]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[11] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[12] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[13]

In this case, appellant's notice of traumatic injury, filed on May 1, 1990 after appellant slipped from a rope during a training exercise and fell on his buttocks, was accepted for a lumbar strain. Appellant returned to work on light duty and filed a claim for a schedule award on March 4, 1996.

Based on a May 17, 1996 report from Dr. Jeffrey L. Brandon, a Board-certified orthopedic surgeon, the Office denied appellant's claim on June 7, 1996 on the grounds that

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[6] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[7] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[8] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c)(May 1996).

[10] *Id.*

[11] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[12] *Bradley L. Mattern*, *supra* note 6 at 817.

[13] *Gregory Griffin*, 41 ECAB 458, 466 (1990); *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

Dr. Brandon found no impairment of appellant's lower extremities resulting from his back condition.

Appellant requested reconsideration on September 3, 1997, which the Office denied on October 24, 1997 as being untimely and insufficient to show clear evidence of error. The Office found that the evidence submitted in support of reconsideration was insufficient to constitute clear evidence of error.

With its June 7, 1996 decision denying appellant's claim for a schedule award, the Office included a statement of appeal rights, which clearly stated that any request for reconsideration must be made, in writing, within one year of the date of the decision. Appellant's request was dated September 3, 1997, several months beyond the one-year deadline and, therefore, untimely filed.

Notwithstanding the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim.[14]

Appellant disagreed with the impairment rating he received, requested that he be reevaluated and submitted several medical reports dealing with the treatment and evaluation of his lower back condition from May through August 1997. While the medical evidence includes the results of a magnetic resonance imaging scan and an electromyogram showing nerve root involvement and degenerative changes in appellant's lumbar spine, none of the reports addresses the relevant issue of impairment to appellant's lower extremities. Therefore, this evidence is insufficient to constitute clear evidence of error.

Appellant argued on appeal that his request for reconsideration was timely filed and submitted a copy of a June 3, 1997 letter faxed to the senior claims examiner who signed the June 7, 1996 decision, stating that he was "hereby requesting that an extension be granted on my *RECONSIDERATION*." Appellant stated that he was unable to "complete" his reconsideration "in time" because of an appointment on June 6, 1997 to have his lower extremities reevaluated and thus would not be "able to meet the due date" on reconsideration.

The record contains no evidence of the June 3, 1997 faxed letter and the Board has no jurisdiction to review on appeal documents not considered by the Office in rendering its final decision.[15] Therefore, the Board rejects appellant's argument and finds that appellant has

[14] *See Robert M. Pace*, 46 ECAB 551, 552 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

[15] The Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *William A. Couch*, 41 ECAB 548, 553 (1990). Thus, the faxed letter dated June 3, 1997 and submitted on appeal cannot be considered by the Board.

submitted no evidence to establish a procedural error or raise a substantial question regarding the correctness of the Office's June 7, 1996 decision.[16]

Further, appellant does not allege any misapplication of the law or other procedural error by the Office in processing his claim. Inasmuch as appellant's request for reconsideration was indisputably untimely and he failed to submit evidence substantiating clear evidence of error,[17] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The October 24, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 23, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[16] *See Fidel E. Perez*, 48 ECAB ___ (Docket No. 95-2188, issued August 26, 1997) (finding that the medical evidence submitted in support of appellant's untimely request for reconsideration, while sufficient to create a conflict in medical opinion, did not rise to the level of clear evidence of error).

[17] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).